

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SHAKA S. MUMITT,	§	
	§	No. 365, 2010
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for Sussex County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0803009083
Appellee.	§	

Submitted: July 26, 2010

Decided: October 1, 2010

Before **HOLLAND, BERGER** and **JACOBS**, Justices.

ORDER

This 1st day of October 2010, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The appellant, Shaka S. Mumitt, filed this appeal from the Superior Court's denial of his motion for postconviction relief pursuant to Superior Court Criminal Rule 61. The appellee, State of Delaware, has filed a motion to affirm on the ground that it is manifest on the face of Mumitt's opening brief that the appeal is without merit.¹ We agree and affirm.

¹ Del. Supr. Ct. R. 25(a).

(2) By amended indictment filed in November 2008, Mumitt was charged with the following offenses: Continuous Sexual Abuse of a Child, Sexual Solicitation of a Child, Rape in the Fourth Degree, four counts of Unlawful Sexual Contact in the First Degree, Offensive Touching, Terroristic Threatening, Endangering the Welfare of a Child, Assault in the Third Degree, and two counts of Non-Compliance with Bond Conditions. The evidence at Mumitt’s jury trial included the testimony of the alleged victims, Mumitt’s minor twin granddaughters, as well as their CAC videotaped interviews as redacted (“CAC videotapes”).² At the conclusion of the three-day trial, the jury found Mumitt guilty as charged. In February 2009, after a presentence investigation, the Superior Court sentenced Mumitt to twenty-three years at Level V.³

(3) In May 2010, Mumitt filed a motion for postconviction relief raising several claims of ineffective assistance of counsel and a claim that his counsel had a disqualifying conflict of interest. In one of his ineffective assistance of counsel claims, Mumitt alleged that his trial counsel and appellate counsel failed to protect his confrontation rights under *Crawford v.*

² CAC is the acronym for The Children’s Advocacy Center of Delaware. The CAC conducts forensic interviews of child victims and witnesses.

³ On direct appeal, Mumitt challenged the sufficiency of the evidence to sustain the third degree assault charge. The Court concluded that the trial judge properly ruled that the evidence was sufficient to submit to the jury and affirmed the judgment of the Superior Court. *Mumitt v. State*, 2009 WL 3191709 (Del. Supr.).

Washington.⁴ In another claim, Mumitt alleged, generally, that the trial judge and/or counsel erred with respect to the admission of the CAC videotapes under title 11, section 3507 of the Delaware Code (“the section 3507 claim”).⁵

(4) By order dated May 28, 2010, the Superior Court denied Mumitt’s postconviction motion as without merit. In particular, the court denied Mumitt’s *Crawford*-related ineffective counsel claim on the basis that *Crawford* “is inapplicable to this case.” The court denied Mumitt’s section 3507 claim as conclusory. This appeal followed.

(5) In his opening brief on appeal, Mumitt argues, as he did in the Superior Court, that his trial and appellate counsel failed to protect his confrontation rights under *Crawford*. Mumitt also argues a slightly clarified section 3507 claim. To the extent, Mumitt has not argued claims on appeal that he raised in the Superior Court, those claims are deemed waived.⁶

(6) To prevail on a claim of ineffective assistance of counsel, Mumitt must show that (i) counsel’s representation fell below an objective standard of reasonableness, and that (ii) counsel’s representation caused

⁴ *Crawford v. Washington*, 541 U.S. 36 (2004).

⁵ See Del. Code Ann. tit. 11, § 3507 (2007) (governing the use of prior statements as affirmative evidence).

⁶ *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

actual prejudice.⁷ In Mumitt’s case, we agree with the Superior Court that the *Crawford* decision was not implicated. The ruling in *Crawford*⁸ does not apply if the declarant is available for cross-examination at trial.⁹ In Mumitt’s case, the declarants, *i.e.*, the alleged victims, both testified at trial and were available for cross-examination. Therefore, Mumitt cannot show that either his trial or appellate counsel’s representation was ineffective with respect to his rights under *Crawford*.

(7) Mumitt’s section 3507 claim, as somewhat clarified on appeal, alleges that the CAC videotapes played for the jury were inadmissible because they included prejudicial third-party statements made by the interviewer. Mumitt, however, does not identify any particular statement or question that was prejudicial. In the absence of such identification,¹⁰ the Court concludes, as did the Superior Court, that the section 3507 claim is conclusory and, therefore, without merit.¹¹

⁷ *Strickland v. Washington*, 466 U.S. 668 (1984).

⁸ *See Crawford v. Washington*, 541 U.S. 36 (2004) (holding that the admission into evidence of a testimonial out-of-court statement violates the Confrontation Clause when the declarant is not a witness at trial and is not subject to cross-examination).

⁹ *See id.* at 59 (reiterating that “when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of [the declarant’s] prior testimonial statements.”).

¹⁰ *Compare Lindale v. State*, 2010 WL 1543853 (Del. Supr.) (considering admissibility of specifically identified portions of recorded CAC interview).

¹¹ *See Stevens v. State*, ___ A.2d ___, 2010 WL 2873802 (Del. July 22, 2010) (providing that “innocuous types of third party statements need not be redacted”).

NOW, THEREFORE, IT IS ORDERED that, pursuant to Supreme Court Rule 25(a), the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice